UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PONCIANO AUSTRIA, Petitioner, v. PAT GLEBE, Respondent.	CASE NO. C09-0347-RSM REPORT AND RECOMMENDATION

Petitioner Ponciano Austria is an inmate at Stafford Creek Corrections Center in Aberdeen, Washington. Proceeding *in forma pauperis*, Mr. Austria filed a *pro se* 28 U.S.C. § 2254 petition for a writ of habeas corpus to challenge his conviction for taking indecent liberties by forcible compulsion with a thirteen year-old girl. Having considered the parties' briefs and the record, the Court recommends that the habeas petition (Dkt. 9) be denied.

BACKGROUND

The Washington Court of Appeals summarized the facts underlying Mr. Austria's conviction:

> Thirteen-year-old MS was at home with her cousin, Rowena

Lomboy, watching two young children. Natie S., MS's mother, ran a day care in her home and had left MS and Lomboy with the children while she ran errands. Lomboy was in the basement with the children while MS took a shower upstairs.

As MS exited the shower, she heard the doorbell ring and expected her brother at the door. She wrapped a towel around herself and went to open the door. Instead of her brother, she saw Austria, her uncle by marriage, and let him in the house. MS and Austria describe the next events differently.

According to MS, Austria asked for bus passes that MS's father had left for him, and MS gave him the passes. Austria asked whether her parents were home, and MS told him that she did not know where they were. Austria then asked MS for a hug, and MS felt uncomfortable. She went into the kitchen, pretending to get something from the refrigerator, and Austria followed her.

MS testified that as she tried to open the refrigerator, Austria tried to grab her. MS resisted and used her legs to try to block him from touching her genitals. Austria touched her chest (over and under the towel) and touched her vagina with his hand. He also grabbed her arm while she was trying to push him away and hold the towel around herself.

MS escaped into the next room, and Austria continued to grab at her. She tripped and fell onto the ground, and Austria tried to touch her chest and vagina again. MS kicked Austria in the groin, and he got off her. Lomboy, still downstairs, heard a loud noise as if someone had fallen upstairs.

MS ran upstairs and locked herself in her bedroom. She testified that Austria knocked on her bedroom door and apologized, but she did not respond. Austria went downstairs to talk to Lomboy for a short conversation, and then left.

Shortly after he left, Austria called the house multiple times. MS did not answer the first few calls, but when she eventually answered the phone, Austria told her to lock the front door. MS was afraid that Austria was still in the house, and she stayed in her room.

When Natie returned home from her errands, she brought a friend

> with her into the house. After she had been home awhile, Natie saw MS and noticed that she looked as if she had been crying and looked angry. Natie thought MS could be angry with her, so she ignored her at first. A few minutes later, MS pulled Natie into another room and started sobbing as she described the assault. MS identified Austria as her assailant, and Natie noticed a bruise on MS's arm. Natie called the police, and the responding officer noticed that MS looked like she had been crying and had wrapped herself in a warm blanket even though it was not cold.
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> Austria was arrested about a month after the assault. He was read his *Miranda*[] rights and agreed to talk to the police detective about the incident. He initially denied touching MS, but eventually said that he may have accidentally bumped against her while he was at her house.
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> At trial, Austria claimed that he went to the house to get bus passes and that once MS gave him the passes, he left. He admitted that he called the house numerous times, but said he was worried he did not close the door all the way, so he wanted MS to check the door.

State v. Austria, 2007 WL 1395420, at *1-*2 (Wash. Ct. App. May 14, 2007) (footnote omitted).

A jury convicted Mr. Austria of taking indecent liberties by forcible compulsion, RCW § 9A.44.100(1)(a), and he was sentenced to an indeterminate term of imprisonment of 58 months to life. (Dkt. 12, Ex. 1, at 1, 5.) On direct appeal, the Washington Court of Appeals affirmed his conviction, *Austria*, 2007 WL 1395420, at *9, the Washington Supreme Court denied both review and his motion to appoint an interpreter, (Dkt. 12, Ex. 9, at 1), and the mandate issued on January 9, 2009, (Dkt. 12, Ex. 10, at 1).

Mr. Austria collaterally attacked his conviction through a state personal restraint petition (PRP) in which he raised as federal constitutional violations two issues previously addressed on direct appeal. (Dkt. 12, Ex. 11.) The Washington Court of Appeals dismissed

his PRP because Washington law does not permit petitioners to relitigate issues already considered and rejected on direct appeal and because there was no suggestion that raising the same issues under federal law would have altered the outcome. (Dkt. 12, Ex. 12 at 1-2.) The Washington Supreme Court denied his motion for discretionary review based on Washington's rule against relitigation and because his failure to show that an application of federal law would have altered the outcome meant the interests of justice would not be served by accepting the petition. (Dkt. 12, Ex. 14, at 1-2.). The PRP's certificate of finality issued on February 20, 2009. (Dkt. 12, Ex. 15.)

On March 17, 2009, Mr. Austria brought a federal habeas petition under 28 U.S.C. § 2254. (Dkts. 1, 9.) Respondent filed an answer on June 8, 2009. (Dkt. 10.) There has been no further briefing and the matter is now ready for review.

GROUNDS FOR RELIEF

Mr. Austria's habeas petition sets forth the following grounds for relief:

1. In violation of due process, there was insufficient evidence because the "to convict" jury instruction required the additional element of proving that the complaining witness MS intended to have sexual contact with Mr. Austria (hereinafter "Added Element" claim), (Dkt. 9-2, at 10-14);
2. In violation of the right to counsel, the trial court improperly denied Mr. Austria's motion for substitution of counsel (hereinafter "Substitution of Counsel" claim), (Dkt. 9-2, at 14-20); and
3. In violation of the Confrontation Clause, the trial court admitted the complaining witness MS's out-of-court statements under the excited utterance exception to the

hearsay rule (hereinafter "Excited Utterance" claim), (Dkt. 9-2, at 20-24).

DISCUSSION

I. Exhaustion of State Remedies

The exhaustion doctrine requires a petitioner to provide the state courts with the opportunity to rule on his federal habeas claims before presenting those claims to the federal courts. *See Picard v. Connor*, 404 U.S. 270, 275 (1971). A petitioner can satisfy exhaustion by either (1) fairly presenting each federal claim to the highest state court, or (2) showing that no state remedy is available. *See Johnson v. Zenon*, 88 F.3d 828, 829 (9th Cir. 1996). "[O]rdinarily a state prisoner does not 'fairly present' a claim to a state court if that court must read beyond a petition or a brief (or a similar document) that does not alert it to the presence of a federal claim in order to find material, such as a lower court opinion in the case, that does so." *Baldwin v. Reese*, 541 U.S. 27, 32 (2004).

Respondent concedes that Mr. Austria has exhausted his state court remedies as to grounds two and three, i.e., the Substitution of Counsel and Excited Utterance claims. (Dkt. 10, at 5; *see* Dkt. 12, Ex. 7, at 1, 6-18 (petition for review to the Washington Supreme Court referring to Substitution of Counsel claim); Dkt. 12, Ex. 13, at 7-8 (motion for discretionary review to the Washington Supreme Court of the PRP referring to the Excited Utterance Claim.) Respondent asserts, however, both that Mr. Austria failed to exhaust the Added Element claim, *and* that the claim is barred by state law. (Dkt. 10, at 5, 11-14.) These dual assertions appear to conflate the related doctrines of exhaustion and procedural bar.[1] If the petitioner has

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1As the Ninth Circuit has noted:

> The exhaustion doctrine applies when the state court has never

procedurally defaulted on a claim in the state courts then exhaustion is satisfied because no remaining state remedy exists. *See Coleman v. Thompson*, 501 U.S. 722, 732 (1991). The petitioner will also be procedurally barred from proceeding on the claim in federal court unless one of the exceptions to procedural bar applies. *See id.* at 750.

On direct appeal to the Washington Court of Appeals, Mr. Austria (represented by counsel) presented the Added Element claim as a federal due process claim that the state must prove every element of an offense beyond a reasonable doubt. (*See* Dkt. 12, Ex. 3, at 7 (citing *Jackson v. Virginia*, 443 U.S. 307, 316 (1979)).) In his *pro se* petition for review of his direct appeal and in his *pro se* motion for discretionary review of the PRP, he renewed this assignment of error to the Washington Supreme Court. (Dkt. 12, Ex. 7, at 1 (referring to Added Element claim); Dkt. 12, Ex. 13, at 7 (referring to Added Element claim and citing *Jackson v. Virginia* and *Burks v. United States*, 437 U.S. 1 (1978)).) Mr. Austria has clearly exhausted the Added Element claim by presenting it as a federal claim to the highest state court. The relevant

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> been presented with an opportunity to consider a petitioner's claims and that opportunity may still be available to the petitioner under state law. In contrast, the procedural default rule barring consideration of a federal claim applies only when a state court has been presented with the federal claim, but declined to reach the issue for procedural reasons, or if it is clear that the state court would hold the claim procedurally barred.

Franklin v. Johnson, 290 F.3d 1223, 1230 (9th Cir. 2002) (citations omitted and internal quotation marks removed). "Thus, in some circumstances, a petitioner's failure to exhaust a federal claim in state court may *cause* a procedural default," e.g., when a petitioner, to satisfy the exhaustion requirement, must present his or claims to a court that would now find them to be procedurally barred. *Cassett v. Stewart*, 406 F.3d 614, 621 n.5 (9th Cir. 2005). Respondent does not suggest that Mr. Austria failed to present the Added Element claim to the state court in the first instance. The Washington Court of Appeals addressed the Added Element claim at length before rejecting it on procedural grounds. *See Austria*, 2007 WL 1395420, at *2-*4.

inquiry thus does not concern exhaustion but procedural bar, i.e., may this Court on federal habeas review consider the Added Element claim on the merits or is it procedurally barred based on independent and adequate state grounds.[2]

II. Standard of Review

Under the Anti-Terrorism and Effective Death Penalty Act (AEDPA), a habeas corpus petition may be granted with respect to any claim adjudicated on the merits in state court only if the state court's adjudication is "contrary to," or involved an "unreasonable application" of, clearly established federal law, as determined by the Supreme Court. 28 U.S.C. § 2254(d). Under the "contrary to" clause, a federal habeas court may grant the writ only if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law, or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. *See Williams v. Taylor*, 529 U.S. 362, 405 (2000). Under the "unreasonable application" clause, a federal habeas court may grant the writ only if the state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the prisoner's case. *Id.* at 407-09. In addition, a state court's decision may be overturned only if the decision is "objectively unreasonable." *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003). When a state high court's decision is summary in nature, a federal habeas court will "look through" the decision and presume the high court adopted the reasoning of the lower court. *See Ylst v. Nunnemaker*, 501 U.S. 797, 804-05 & n.3 (1991); *LaJoie v. Thompson*, 217 F.3d 663, 669 n.7 (9th Cir. 2000).

AEDPA's strict standard of review is relaxed to a certain extent when the state court

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2 The Court addresses this question *infra* in the discussion of the Added Element claim.

reaches a decision on the merits but provides no reasoning to support its conclusion. *Pirtle v. Morgan*, 313 F.3d 1160, 1167 (9th Cir. 2002). Under such circumstances, a federal habeas court independently reviews the record to see whether the state court clearly erred in its application of Supreme Court law but will still defer to the state court's ultimate decision. *Id.* When it is clear that the state court did not reach the merits of a properly raised issue, a federal habeas court will review the issue de novo. *Id.* Under such circumstances, de novo review is proper because the concerns about comity and federalism that arise when a state court reaches the merits of a petition for post-conviction relief do not exist. *Id.* Nonetheless, factual determinations by the state court are presumed correct and can be rebutted only by clear and convincing evidence. *Id.* at 1168; 28 U.S.C. § 2254(e).

III. Petitioner's Claims

The Washington Court of Appeals issued, on direct appeal, the last reasoned opinion regarding the issues raised in Mr. Austria's habeas petition, and no state court thereafter, even during the collateral PRP proceedings, saw fit to disturb that opinion's reasoning when the claims returned in explicit, federal constitutional raiment. The Washington Court of Appeals declined to consider the merits of the Added Element claim because "general principles of waiver and a policy against misleading the courts" barred Mr. Austria from raising on appeal an interpretation of the "to convict" jury instruction that contradicted assertions made to the trial judge. *Austria*, 2007 WL 1395420, at *4. The Washington Court of Appeals reviewed the merits of the Substitution of Counsel and Excited Utterance claims and rejected them. *See id.* at *4-*8.

The state court adjudication of the Substitution of Counsel and Excited Utterance claims

was neither contrary to, nor involved an unreasonable application of, clearly established federal law. Murkier is whether an adequate state ground exists to bar federal review of the Added Element claim. The *Austria* decision, diverging strands of case law, and respondent's invocation of the invited error doctrine, which the Washington Court of Appeals explicitly chose not to apply, suggest that federal review on the merits should not be precluded. Nonetheless, on a *de novo* review of the merits the Court finds that Mr. Austria's Added Element claim does not suggest a due process violation. The Court therefore recommends that Mr. Austria's habeas petition be denied in its entirety.

A. Added Element Claim

The Washington Court of Appeals cogently described the Added Element claim Mr. Austria now raises in his habeas petition. To understand the doctrinal tension provoked by this claim, it is best to examine that discussion verbatim:

> Austria argues that the use of the word "intentional" in the "to convict" instruction required the State to prove that the complaining witness intended sexual contact with the defendant. Because the State did not prove this, Austria argues that his conviction should be reversed.
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> The "to convict" instruction was proposed by Austria, and reads,
>
> > To convict the defendant of the crime of indecent liberties, each of the following elements of the crime must be proved beyond a reasonable doubt:
> >
> > (1) That on or about the 27th day of March, 2004, the defendant knowingly caused [MS] to have intentional sexual contact with the defendant;
> >
> > (2) That this sexual contact occurred by forcible compulsion;

> (3) That the defendant was not married to [MS] at the time of the sexual contact; and
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> (4) That the acts occurred in the State of Washington.
>
> ....

The trial court noted that the instruction's use of the word "intentional" in the first element was ambiguous, but the prosecutor stated that he did not object to the instruction because it conformed to language used in the information. Defense counsel also assured the trial court that no reasonable jury would read the instruction to mean that the crime required the complaining witness to intend sexual contact.

> THE COURT: [Prosecutor], does the State have any position on insertion of the term "intentional" before sexual contact in the instruction which indicates what a person has to do to commit the crime of indecent liberties?
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> ....
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> [Prosecutor]: Your Honor, I did a little bit of quick checking, and I believe that [defense counsel's] position is well taken, that if we put something in, charge it in the Information, then I think we are required to prove it, so I have no objection to his proposed modifications of the two jury instructions.
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> THE COURT: My concern with the word "intentional," and I think your point is well taken, is that it's a little bit ambiguous as to whose intent we're talking about here.
>
> I'll tell you why, the Pattern instruction says a person commits the crime of indecent liberties when he knowingly causes another person who is not his spouse to have sexual contact with him or another by forcible compulsion. And then we define what sexual contact is, and we define

> sexual contact as the touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party; but if we stick the word "intentional" in there, it may imply that it's intentional on the part of [MS] as opposed to intentional from the standpoint of Mr. Austria. And that's the only reason I'm hesitating, but I don't know why I'm even talking about it if both parties are in agreement.
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> [Defense counsel]: The difficulty with lawyers, they tend to-I can see the-I can see the judge's reading of it, I don't think the jury is going to see it that way, I think if you were to make an effort to break it down, you could reach that conclusion, I don't think it's reasonable to assume that the jury will break it down.
>
> When you look at it, it is the defendant who's acting to have that sexual contact, and I think that's the clear reading of it. While there may be some possible ambiguity to it, I don't think-I don't think the likelihood of the jury looking at it that way is significant at all.
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> THE COURT: All right. I'm going to get off the bench and get that instruction, I'll be right back.

Verbatim Report of Proceedings (VRP) (June 28, 2005) at 147-49. Although Austria's defense counsel below assured the trial court that the instruction could only be reasonably read to mean that the defendant must intend the sexual contact, his appellate counsel now argues that the instruction must be read the opposite way-to require the State to prove that MS intended the sexual contact.

The State argues that Austria should be prevented from making this argument under the doctrines of invited error or waiver because he made the opposite argument below. Austria argues that those doctrines do not apply here. Austria argues that invited error applies only where a defendant's proposed instruction is given to the jury, and then the defendant attempts to claim on appeal that the instruction was erroneous. *See State v. Medina,*

112 Wn.App. 40, 47 n. 11, 48 P.3d 1005 (2002) (holding that invited error doctrine does not apply because the defendant did not argue that the "to convict" instruction he requested was erroneously given). Thus, because Austria argues not that the instruction was erroneous but that it added an additional unproved element to the crime, he claims the invited error doctrine does not bar his argument here.

While it may be true that the invited error doctrine does not technically apply here, we conclude that the principle underlying the doctrine-discouraging defendants from misleading trial courts-applies to prevent Austria from making this argument. *See State v. Henderson*, 114 Wn.2d 867, 868, 792 P.2d 514 (1990) (stating that without the invited error doctrine, there would be a "premium on defendants misleading trial courts; this we decline to encourage."). Below, Austria's counsel told the trial court that the only reasonable reading of the instruction was that "intentional" referred to Austria's intent, and the closing argument was consistent with that reading of the instruction. Here, Austria's counsel argues that the only reasonable reading of the instruction was that "intentional" referred to MS's intent-an interpretation that trial counsel argued was unreasonable.

Surely the State should have objected to the instruction as proposed and the trial court should not have given an instruction that ambiguously defined the elements of a crime, but we cannot permit Austria to argue at trial that one interpretation of the instruction is the only reasonable one, and then argue on appeal that the opposite interpretation is the only reasonable one. We conclude that under general principles of waiver and a policy against the misleading of trial courts, Austria's affirmative representation below that the instruction did not create an additional element bars his argument here that an additional element was added and not proved.

Moreover, the instruction requires that intentional sexual contact occur by forcible compulsion-but if the "intentional" referred to intent on the part of MS (as Austria now argues), it would not be by forcible compulsion because she intended it to occur. While Austria offers a strained reading of the instruction (that he could have initially forced the contact and MS later acquiesced, or that MS initially intended the contact and then changed her mind) to

> argue that the instruction can make sense with "intentional" referring to MS, the instruction as a whole more logically suggests that "intentional" refers to Austria because of the forcible compulsion element.
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> Therefore, because Austria's counsel below argued that the only reasonable interpretation of the instruction was that "intentional" referred to Austria, and because the language of the instruction as a whole logically supports that interpretation, we refuse to consider Austria's argument on appeal that the opposite interpretation is the only reasonable interpretation.

Austria, 2007 WL 1395420, at *2-*4.

Stated simply, Mr. Austria claims a due process violation because the "to convict" jury instruction required the state to prove beyond a reasonable doubt that MS intended to have sexual contact with Mr. Austria and, since all of the evidence adduced at trial suggested MS's resistance to sexual contact, there was insufficient evidence of such intentionality. Respondent's argument in response is twofold: (1) the Added Element claim is barred because "[t]he Washington Court of Appeals expressly ruled that the invited error doctrine bars review of the claim," (Dkt. 10, at 14); and (2) regardless, there is no constitutional error because the "to convict" instruction did not add an element and the prosecution had no burden to prove an element that does not exist in the statute, (*id.* at 15). Respondent's first contention is contradicted by the plain language of the *Austria* opinion. Respondent's second contention is, however, correct on the merits because there is no reasonable likelihood that the jury applied the "to convict" instruction in a manner that violates the Constitution.

1. Procedural Bar/Adequate State Grounds

In a habeas corpus proceeding, a federal court will not review a question of federal law decided by a state court "if the decision of that court rests on a state law ground that is

independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). This doctrine "applies to bar federal habeas review when the state court has declined to address the petitioner's federal claims because he failed to meet state procedural requirements." *McKenna v. McDaniel*, 65 F.3d 1483, 1488 (9th Cir. 1995). If a petitioner has procedurally defaulted, a federal court will not review the claim unless petitioner "can establish cause and prejudice or that a miscarriage of justice would result in the absence of our review." *Moran v. McDaniel*, 80 F.3d 1261, 1270 (9th Cir. 1996). "Procedural default is an affirmative defense, and *the state has the burden* of showing that the default constitutes an adequate and independent ground for denying relief." *Scott v. Schriro*, 567 F.3d 573, 580 (9th Cir. 2009) (internal quotation marks removed) (quoting *Insyxiengmay v. Morgan*, 403 F.3d 657, 665 (9th Cir. 2005)). To constitute an "adequate" state procedural ground, "a state rule must be *clear, consistently applied, and well-established at the time* of petitioner's purported default." [3] *Id.* (internal quotation marks removed) (quoting *Lambright v. Stewart*, 241 F.3d 1201, 1203 (9th Cir. 2001)). "A state rule is considered consistently applied and well-established if the state courts follow it in the 'vast majority of cases.'" *Id.* (quoting *Dugger v. Adams*, 489 U.S. 401, 411 n.6 (1989)); *see Ford v. Georgia*, 498 U.S. 411, 424 (1991) (holding that an adequate and independent state procedural bar to the entertainment of constitutional claims must have been firmly established and regularly followed by the time as of which it is to be applied). State rules that are too inconsistently or arbitrarily applied to bar

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3 For a state procedural rule to be "independent," the state law basis for the decision must not be interwoven with federal law. *Bennett v. Mueller*, 322 F.3d 573, 581 (9th Cir. 2003). The parties do not dispute the independence of the *Austria* court's reasons for rejecting the Added Element claim: it relied entirely upon state-law principles.

federal review generally fall into two categories: "(1) rules that have been selectively applied to bar the claims of certain litigants . . . and (2) rules that are so unsettled due to ambiguous or changing state authority that applying them to bar a litigant's claim is unfair." *Bennett v. Mueller*, 322 F.3d 573, 583 (9th Cir. 2003) (internal quotation marks removed) (quoting *Morales v. Calderon*, 85 F.3d 1387, 1392 (9th Cir. 1996)). As the United States Supreme Court has noted, "[n]ovelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457-58 (1958); *see Ford*, 498 U.S. at 423 (quoting *NAACP v. Alabama* and citing several cases for the same proposition).

Respondent has not met his burden to prove that the rules cited by the *Austria* court—waiver and a general policy against misleading the courts—were clear, consistently applied, and well-established at the time the *Austria* court applied them in declining to review the merits of the Added Element claim. Not only has respondent mischaracterized the basis for the *Austria* decision, the *Austria* court's own review of the relevant authorities, Washington case law, and respondent's briefing suggest the inadequacy of the state procedural grounds for declining to review the merits of the Added Element claim.

Although respondent argues that Washington's invited error doctrine procedurally bars Mr. Austria's Added Element claim,[4] the Washington Court of Appeals stated in carefully

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4 Although respondent never specifies whether a "procedural" or a "substantive" bar is applicable, his argument and the *Austria* decision itself, in which the Court of Appeals declined to reach the merits based on how and when the Added Element issue was raised, show that the imposed bar was procedural. *See Black's Law Dictionary* (8th ed. 2004) (defining "procedural

parsed language a different basis for declining to review the merits. First, the *Austria* court acknowledged that the invited error doctrine may not technically apply. *Austria*, 2007 WL 1395420, at *3. Then it noted that the principle *underlying* the invited error doctrine, which discourages defendants from misleading trial courts, prevented Mr. Austria from making his argument. *Id.* Finally, the *Austria* court specifically concluded "that under general principles of waiver and a policy against misleading of trial courts, Austria's affirmative representation below that the instruction did not create an additional element bars his argument here that an additional element was added and not proved." *Id.* at *4.

The *Austria* court was forced to confront overlapping state law doctrines: "law of the case" and "invited error." Under Washington's law of the case doctrine, jury instructions not objected to become the law of the case. *See State v. Hickman*, 954 P.2d 900, 902 (Wash. 1998). "In criminal cases, the state assumes the burden of proving otherwise unnecessary elements of the offense when such added elements are included without objection in the 'to convict' instruction." *Id.* On appeal, a defendant may challenge the sufficiency of evidence of the added element on this basis, even when the added element itself was not part of the criminal statute. *Id.* Thus, in *State v. Hickman*, the state was required to prove that the criminal defendant had committed insurance fraud in a particular county even though venue was not a required element of the criminal statute. *Id.* at 902-04. In contrast, under Washington's invited error doctrine, a "party may not request an instruction and later complain on appeal that the requested instruction was given." *City of Seattle v. Patu*, 58 P.3d 273, 274

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law" as "[t]he rules that prescribe the steps for having a right or duty judicially enforced, as opposed to the law that defines the specific rights or duties themselves").

(Wash. 2002) (citation omitted and internal quotation marks removed). The invited error doctrine has been applied to preclude review of the merits in cases even where the "to convict" instruction omitted an essential element of the crime and that error was of a constitutional magnitude and was therefore presumptively prejudicial. *Id.* (upholding the failure to refer to obstruction as an element in a conviction for obstruction); *see, e.g., State v. Henderson*, 792 P.2d 514 (1990) (upholding the failure to specify the intended crime in a conviction for attempted burglary); *State v. Summers*, 28 P.3d 780 (Wash. Ct. App. 2001) (upholding the omission of the knowledge element for unlawful possession of a firearm).

The *Austria* court declined to apply the invited error doctrine to Mr. Austria's contention because doing so might be reasonably construed to contradict *State v. Medina*, 48 P.3d 1005 (Wash. Ct. App. 2002). *See Austria*, 2007 WL 1395420, at *3. In *Medina*, the Washington Court of Appeals found that the law of the case doctrine required the state to carry a greater burden in proving first-degree kidnapping because the state had failed to object to a "to convict" instruction that omitted a significant clause in the criminal statute. *Medina*, 48 P.2d at 1009. The *Medina* court rejected application of the invited error doctrine because "[t]hat doctrine applies when a party requests an instruction and then argues on appeal that the instruction should not have been given." *Id.* at 1010 n.11. It noted that "[defendant] does not argue on appeal that the 'to convict' instruction was erroneously given, so the invited error doctrine does not apply." *Id.*

The *Austria* decision itself suggests that waiver and a general policy against misleading the courts constituted a discretionary, prudential bar against consideration of the merits rather than a clear, consistently applied, and well-established procedural bar. *See, e.g., McKenna*, 65

F.3d at 1489 ("[T]he court's refusal to entertain [petitioner's] complaints on collateral review, at best, represents a refusal to exercise discretion to hear the claim. This is insufficient for the State to invoke the procedural bar doctrine."); *Russell v. Rolfs*, 893 F..2d 1033, 1035-36) (9th Cir. 1990) ("It is significant in our interpretation that the Washington Supreme Court decided not to exercise its discretionary power-as contrasted with refusing to hear Russell's case because of a procedural bar . . . ."). The *Austria* court cited a single case, *Medina*, in which a defendant made a sufficiency of the evidence argument about a "to convict" instruction amended by the law of the case doctrine. *Austria*, 2007 WL 1395420, at *3. *Medina*, however, not only supports Mr. Austria's position, it also never discusses waiver and the general policy against misleading the courts. The *Austria* court cited an invited error doctrine case to support its conclusion, *State v. Henderson*, 792 P.2d 514 (Wash. 1990). *See Austria*, 2007 WL 1395420, at *3. *Henderson*, however, makes no reference to the law of the case doctrine and does not suggest that waiver and the general policy against misleading the courts should be applied as an alternative to the invited error doctrine.

Respondent cites no cases that support applying waiver and the general policy against misleading the courts to Mr. Austria's Added Element claim. Respondent also does not address why the law of the case doctrine would not apply to the "to convict" instruction at issue here. In *State v. Hickman*, the Washington Supreme Court set forth the broad scope of the law of the case doctrine. *Hickman*, 954 P.2d at 902-04. The *dissent* argued that the defendant waived any arguments regarding the sufficiency of the evidence of an additional element due to his tardy assertion of the claim. *Id.* at 904-07 (Talmadge, J., dissenting). By referring to the invited error doctrine, which the *Austria* court declined to apply, respondent merely

underscores the inadequacy of the state law grounds for procedurally barring consideration of the Added Element claim upon federal habeas review.

The Court finds that no adequate state law grounds exist that would procedurally bar federal habeas review of Mr. Austria's assertion of constitutional error with respect to his Added Element claim. The Court therefore considers the claim on the merits.

2. Examination of the Merits

Because the Washington Court of Appeals did not reach the merits of the Added Element claim, the Court reviews the issue de novo, presuming all factual determinations to be correct unless rebutted by clear and convincing evidence. *See Pirtle*, 313 F.3d at 1167-68. Mr. Austria alleges a violation of due process because the prosecution failed to prove the element added to the "to convict" instruction that the victim intended sexual contact. This argument fails on the merits because there is no federal constitutional right to have the state prove an element that is unnecessary to the crime and a rational trier of fact could have found the necessary elements of the crime beyond a reasonable doubt.

The critical inquiry on review of the sufficiency of the evidence to support a criminal conviction is not simply to determine whether the jury was properly instructed, but "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979). "Even if there is some ambiguity, inconsistency, or deficiency in the instruction, such an error does not necessarily constitute a due process violation. Rather, the defendant must show both that the instruction was ambiguous and that there was a reasonable likelihood that the jury applied the instruction in a way that relieved the

State of its burden of proving every element of the crime beyond a reasonable doubt." *Waddington v. Sarasaud*, 129 S. Ct. 823, 831, ___ U.S. ___ (2009) (citations omitted and internal quotation marks removed). The jury instruction is not viewed in isolation but considered in the context of the instructions as a whole and the trial record. *Id.* at 832. It is not enough that there is some "slight possibility" that the jury misapplied the jury instruction; the pertinent question is whether the instruction by itself so infected the entire trial that the resulting conviction violates due process. *Id.* (internal quotation marks and emphasis removed).

To the extent Mr. Austria seeks to vindicate his right to have Washington's law of the case doctrine apply to require proof of an element that is not contained in the criminal statute, there is no federal constitutional right to have elements *inessential* to the conviction proven beyond a reasonable doubt. *See generally Jackson*, 443 U.S. at 319. The state courts declined to apply the state-created law of the case doctrine here and "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). No authorities support a federally-created right to have the prosecution prove a misstatement of state law because the misstatement is contained in the "to convict" instruction.

To the extent Mr. Austria argues that the "to convict" instruction was ambiguous because it implied that the state was required to prove that MS intended to have sexual contact with Mr. Austria in addition to, or instead of, proving that Mr. Austria intended to have sexual contact with MS, the instruction was neither ambiguous nor did it infect the trial such that the resulting conviction has been called into doubt. As the *Austria* court noted, MS's testimony

suggested that she never intended to have sexual contact with Mr. Austria, and the instruction itself required that intentional sexual contact occur by forcible compulsion. *Austria*, 2007 WL 1395420, at *1-*2, *4. There would be no forcible compulsion if MS intended the sexual conduct to have occurred. *Id.* at *4. The "to convict" instruction as a whole more logically suggests that "intentional" refers to Mr. Austria, and no rational juror, faced with the instruction in light of the evidence presented at trial, would find otherwise.

The challenged "to convict" instruction contains the essential elements of the crime of taking indecent liberties with forcible compulsion and a rational trier of fact could have found those elements beyond a reasonable doubt. The Court recommends that Mr. Austria's Added Element claim be denied.

B. Substitution of Counsel Claim

Mr. Austria contends that the trial court improperly denied his motion for substitution of counsel in violation of his Sixth Amendment right to counsel. The Substitution of Counsel claim lacks merit because the trial court made a meaningful inquiry into the conflict between Mr. Austria and his counsel and there is no indication that the conflict was so severe that it prevented effective assistance of counsel.

The qualified right of choice of counsel applies only to persons who can afford to retain counsel. *See United States v. Gonzalez-Lopez*, 548 U.S. 140, 151 (2006); *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624 (1989); *Schell v. Witek*, 218 F.3d 1017, 1025 (9th Cir. 2000) (en banc). There is no suggestion that Mr. Austria could or wanted to retain counsel. Consequently, the trial court's denial of his motion for substitute counsel raises a different question: whether the conflict between Mr. Austria and his attorney prevented

effective assistance of counsel. *See Morris v. Slappy*, 461 U.S. 1, 13-14 (1983) (holding that the Sixth Amendment requires only competent representation and does not guarantee a meaningful relationship between a defendant and counsel); *Schell*, 218 F.3d at 1026 (same). The Ninth Circuit has applied the constructive denial of counsel doctrine to "cases where the defendant has an irreconcilable conflict with his counsel, and the trial court refuses to grant a motion for substitution of counsel." *Daniels v. Woodford*, 428 F.3d 1181, 1197 (9th Cir. 2005). For federal cases on direct appeal, the Ninth Circuit test for determining whether the trial court should have granted a substitution motion is the same as the test for determining whether an irreconcilable conflict existed. *Id.* In such cases, a federal court considers: (1) the extent of the conflict; (2) whether the trial court made an appropriate inquiry into the extent of the conflict; and (3) the timeliness of the motion to substitute counsel. *Id.* at 1198. On habeas review, a federal court examines not whether a trial court "abused its discretion," but whether this error actually violated constitutional rights in that the client-attorney conflict "had become so great that it resulted in a total lack of communication or other significant impediment." *Schell*, 218 F.3d at 1026. As to effective representation, judicial scrutiny of counsel's performance is highly deferential, and "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland v. Washington*, 466 U.S. 668, 690 (1984).

The trial court evaluated Mr. Austria's motion for substitution of counsel in the following manner:

> [Defense counsel]: Your Honor, Mr. Austria requested I set this hearing to fire me. Perhaps the best approach, at this point, would be for him to address the Court.

THE COURT: I agree. Good morning, Mr. Austria.

THE DEFENDANT: Good morning.

THE COURT: Can you tell me what your issue is with [defense counsel] and his representation?

THE DEFENDANT: I don't trust him.

THE COURT: Why not?

THE DEFENDANT: Well, every time the two of us have a meeting, we cannot agree on things.

THE COURT: Like what?

THE DEFENDANT: Like dealing with the case; every time I talk to him, he tells me that this case is not (inaudible).

THE COURT: You know, Mr. Austria, one of the things that the attorney has to do is give you an honest assessment of the case; and that includes giving you the bad news about it as well as the good news. Anything else?

THE DEFENDANT: So does that mean I can't replace him?

THE COURT: I haven't ruled yet. I just want to make sure you had an opportunity to give me more views on the subject.

THE DEFENDANT: Nothing more.

THE COURT: All right. Mr. Austria, I understand how you view the case; but [defense counsel] is an experienced attorney, well known and well able to deal with cases such as yours; and the ultimate decision on cases where he is appointed by the Court is the Court's decision and not your individual decision. [Defense counsel]?

[Defense counsel]: Your Honor, there was one thing I wanted to add. Well, Mr. Austria and I have had a number of conversations regarding the best approach in the case; and I understand that may have caused some level of frustration for Mr. Austria. The difficulty in this case arose during preparation for trial, and I

> think Mr. Austria became frustrated with the process of going over material multiple times; and I think Mr. Austria and I can work well together if he understands that preparation for trial involves, perhaps, asking the same question multiple times. I would expect future problems only if Mr. Austria is unwilling to continue to sit down with me to discuss, perhaps for the seventh or eighth time, the details of the case.
>
> THE COURT: Good point. What's the charge in this case, [defense counsel]?
>
> [Defense counsel]: The charge is indecent liberties. The charge is indecent liberties, and the trial date is currently May 23rd.
>
> [Prosecutor]: Right, this Monday.
>
> THE COURT: Mr. Austria, [defense counsel]'s points are well taken; and, in fact, the point that he's willing to go over things multiple time testifies to his level of preparation; so you need to continue to work with him, and the motion is denied.

Austria, 2007 WL 1395420, at *5 (quoting Verbatim Report of Proceedings, May 17, 2005).

Mr. Austria has failed to show that his conflict with appointed counsel prevented effective assistance of counsel. The trial court made an appropriate inquiry into the extent of the conflict and found it to be inconsequential. As the Washington Court of Appeals noted, Mr. Austria was given an opportunity to air his concerns but did not elaborate beyond expressing a general mistrust of counsel and a failure to agree on the merits of the case. *Austria*, 2007 WL 1395420, at *5. Such vague allegations fall short of demonstrating an irreconcilable conflict that might suggest constructive denial of the right to counsel or deficient and prejudicial representation. *Strickland*, 466 U.S. at 687; *Daniels*, 428 F.3d at 1197.

The state court's adjudication of Mr. Austria's Substitution of Counsel claim was neither contrary to, nor involved an unreasonable application of, clearly established Supreme

Court precedent. The Court recommends that Mr. Austria's Substitution of Counsel Claim be denied.

C. Excited Utterance Claim

Mr. Austria argues that the Confrontation Clause of the Sixth Amendment was violated because the trial court admitted as an excited utterance exception to the hearsay rule MS's out-of-court statements to her mother. (Dkt. 9-2, at 20-24.) This argument is foreclosed by established Supreme Court precedent.

The Confrontation Clause is not implicated when a declarant is available for cross-examination about hearsay statements. *Crawford v. Washington*, 541 U.S. 36, 59 n. 9 (2004) ("Finally, we reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements."); *California v. Green*, 399 U.S. 149, 162 (1970) ("[W]here the declarant is not absent, but is present to testify and to submit to cross-examination, our cases, if anything, support the conclusion that the admission of his out-of-court statements does not create a confrontation problem."). MS testified at trial and was available for cross-examination. The trial court therefore did not violate Mr. Austria's right to confront his accuser by admitting MS's out-of-court statements.

The state court's adjudication of the Excited Utterance claim was neither contrary to nor an unreasonable application of Supreme Court case law. The Court recommends that Mr. Austria's Excited Utterance claim be denied.

CONCLUSION

For the reasons discussed above, the Court recommends that petitioner's 28 U.S.C. §

2254 habeas petition (Dkt. 9) challenging his conviction and sentence for taking indecent liberties by forcible compulsion be DENIED. A proposed order accompanies this Report and Recommendation.

DATED this 26th day of August, 2009.

Mary Alice Theiler
United States Magistrate Judge